IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

DAVID E. BURLEY,
Plaintiff in Error,

v.

THE UNITED STATES,
Defendant in Error,

and

CANYON COUNTY, IDAHO,
Defendant.

1803

REPLY BRIEF OF PLAINTIFF IN ERROR.

JOHN G. WILLIS,
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At the opening of oral argument, the Court, at the request of counsel for Plaintiff in Error, granted leave to file a reply brief on behalf of said party. We will take up and consider, seriatim, the several matters advanced by counsel for Defendant in Error.

The opening statement in the answering Brief is

as follows: "No clearer statement of plaintiff's right to condemn the lands in question, could have been made than is set forth in the amended complaint."

We quite agree with counsel; the **right** to condemn, was so contaminated with **wrongs** to be inflicted, as to obscure the statement of right. Counsel misconceive our objection. It was not directed to the "right" of the Defendant in Error to condemn, we did not seek to have that made plainer. It was the **wrongs** of the Defendant in Error that we ecomplain against; an inference of its intention to inflict, being as clearly disclosed by its pleading, as its right in the premises. As illustrated: Suppose a person, who has received personal injury, in attempting to set out his right to a recovery, should disclose language from which an inference of contributory neglect was deducible; the fact that, in attempting to set out his right, he had disclosed a negligent conduct, contributing proximately to the injuries complained of, could not deny the defendant privilege to take advantage of such disclosure. We make none, nor could we make any, complaint aganst the "rights" of the Defendant in Error to condemn the land in question for governmental purposes. We did, and do, complain against the intended wrongs, disclosed by its pleading, and evidence, of an intention to take our land for private purposes.

By the provision of section numbered 4168 of the Revised Codes of Idaho, we find the oft-reiterated statement of pleading, to the effect that a com-

plaint should contain "a statement of the **right** of plaintiff," and by the same section, 4168, it is commanded that such statement shall be "in ordinary and concise language." While these requirements should be met; if, in attempting to meet them, we disclose an intended wrong, surely no provision of pleading would restrain the opposite party from taking advantage of such disclosure.

It is stated that because the word "primarily" is used in connection with the conceived right, that it is not fair to infer that the ulterior purposes are wrongful in design. If the pleader went out of his way to use the word "primarily," he cannot complain of the inference properly deducible from the use of such qualifying term. Quite true, Mr. Webster defines the word "primarily" as being in a primary manner, still Mr. Webster does not put a limitation upon that which is deducible from the use of the term; nor, when he says "in the first place," does he restrict the thought from being indulged in that there is a necessary second place; nor when he says "in the first intention," limit an inference that there has been a second intention, supplanting the first intention; and, when he uses the definatory term "originally" he intends to imply that, whatever the **original** intention was, it has been abandoned, and one, that was not original, substituted for it.

An examination of the cases cited to sustain counsel's contention that the verdict cures defects

in substance, do not sustain, when applied to the procedure had in this case. Issue was joined in this case because the court required it, by its ruling upon the demurrer. We have never understood that, by pleading over, after a timely objection by demurrer, that the questions raised by the demurrer were cured by a verdict, in any wise. An examination of these cases will disclose that no timely and pertinent objection was made, such as was our contention by the several demurrers filed herein. If that be true, then no question of law, such as is presentable by demurrer, could be reviewed, where a verdict had been returned.

This Court's attention has been directed to its decision, rendered in the Shasta Power case, 150 Federal, 861, in which the Court reviewed the decision in the case of Water Power Company vs. Berrien, Circuit Judge, 133 Michigan, 48, (94 N. W. 379) to the effect that the doctrine had been sustained that land could be taken, under the power of eminent domain, for a legitimate use, even though a private purpose will be thereby "incidentally" served. No fair mind can attend the case at bar and say that the service proposed to be rendered to private individuals by the Government, is a mere "incident" to the construction of its water system. From conception of the scheme, and from inception of the work, down to the present day, the purpose to irrigate private property, and thereby render the service of a mere, private,water-furnishing concern, was no "incident;"

but was as chief, in every respect; and, when comparison in magnitude is made, was far superior, overwhelmingly so, to the purpose of the Government to irrigate its own land. In the Shasta Power case a private corporation sought, under the eminent domain act of California, the devotion of private property to a use, incidental to the purposes of condemnation conferred by the legislature. The corporation purposing such service had many powers not possessed by the Government of the United States. All it purposed doing, it had the inherent power to do, and, in that case, the private service was a real mere incident to the exercise of these powers. Not so in the case at bar, for two reasons: First, The Government of the United States does not possess the power to enter the field of water-serving to mere private interests, on the one hand; nor, second, was it a mere incident of intention, or fact; but was chief, if not principal, in design; and was excessive in magnitude. In the Berrien Springs case it was said:

> "Where a corporation, seeking to construct a dam, intends to use the water power appurtenant thereto, for mining, manufacturing, domestic, municipal, agricultural, and navigation purposes, and to furnish the people of the village with electricity, the water power, being for the purposes of which many are private, must be regarded as private in its character, and the land cannot be condemned for the creation thereof."

> "Public acts (naming them) permitting the taking of land under eminent domain for

> the construction of a navigable waterway, with appurtenant water power, which may be for private purposes, is unconstitutional, as it authorizes the taking of property for private purposes."

The decision cites the 24th American Report, page 564, and the 14th L. R. A., page 114, each of which cases sustain our contention, and we invite consideration thereof.

Cooley's Constitutional Limitations, 5th ed., page 674, is also cited, and the following quotation is made therefrom: "It follows from the above principle, as well as from general reasoning, that where the corporation intends to devote said lands both to public and private uses, only so much can be taken as is necessary to the public use." With which principle we fully concur, and urge the constitutionality of the Reclamation Act, so long as the Government devotes lands dedicated to an entirely public use, as distinguished from a superior burden, in favor of mere private uses. And we, likewise, agree with the doctrine enunciated by the cases cited on the page numbered 10 of the answering brief, to the effect, that, when a benefit to be served is common, the mere fact that it is inequal in degree of apportionment among the several users, will not defeat the right to exercise eminent domain. As is illustrated by the cited case of McQuillen vs. Hatton, 42 Ohio St., 202, where it was held:

> "The facts being ascertained, the ques-

> tion whether or not a ditch will conduce to the public health, convenience, or welfare, within the meaning of Rev. Stat. Section 4511, so that it will be a public use, is a question of law; and the mere fact that larger or better crops may be raised on two farms sought to be drained, does not authorize the establishment of the ditch."

The cited section from 1 Lewis on Eminent Domain, (section 161), reads as follows:

> "It is not necessary that the entire community or any considerable portion of it, should directly participate in the benefit to be derived from the property taken. 'The public use required need not be the use or benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small, or restricted locality; but the use and the benefit must be in common, not to particular individuals, or states.' "

In other words, the numbers of people served will not, per se, defeat the exercise of the right to condemn, so long as those who are served are afforded equality of service. This is evidenced by the Congressional Masters' Liability Act, and similar legislation, from that and other legislative bodies. So long as all of any one class are effected, complaint on the ground of inequality may not be made. The Master's Liability Act is designed to effect all carriers who further interstate commerce, as distinguished from carriers wholly intrastate, or private; it bears equally upon the class effected; and, so long as this be true, right to complain does not exist. This

was held in the case of Bank vs. Fenne, 8 Wallace, 533, cited by counsel for Defendant in Error, the language being:

> "The fact that taxes bear heavy upon a corporation or a class of corporations, cannot, for that reason, only, be pronounced contrary to the Constitution."

The imposition of burdens upon a class, as distinguished from burdens upon some members of a class, is the principle enunciated, as being properly imposed; and, so it was held in the citation to Cooley's Principles of Constitutional law, page 58:

> "Constitutionally a tax can have no other basis than the raising of revenue for public purposes, and whatever governmental exaction has not this basis is tyrannical, and unlawful. A tax on imports, therefore, the purpose of which is, not to raise revenue, but to discourage and indirectly prohibit some particular import for the benefit of some home manufacture, may well be questioned, as being merely colorable, and therefore, not warranted by constitutional principles."

So we say in the case at bar. The legislation was colorable; the act of the Cabinet Officer seeking to condemn in application thereof, is colorable—highly so; an ostensible public devotion, for excessive private favorings.

Referring to the claim that the Act is constitutional, even when the object sought is a private service, counsel has quoted from the Gettysburg case,

160 U. S., 668-81. The substance of the holding of that case was, "The United States may condemn whenever it is necessary or appropriate to use the lands in the execution of any of the powers granted to it by the constitution." We are quite agreed with this doctrine; whenever it is in "execution of any of the powers granted." Our insistence is that the purpose of serving a lot of ranch owners is not within" "any of the powers granted by the constitution." In the Gettysburg case the Defendant in Error sought to condemn one of the decisive battlefields to the use of all the people of the United States, and undoubtedly this power it possessed. Had it sought to condemn this property to the use of the farmers living in that immediate neighborhood, a different principle would have been involved, and a different conclusion reached by the Supreme tribunal, upon its consideration.

Counsel has confounded the expression of Congress, contained in the Act of February 9, 1887, prescribing the **practice** to be followed in cases of condemnation under that act (which authorizes the Secretary of the Treasury to condemn for postoffice, custom house, arsenal, dry-dock, and fortification purposes), with the right to **exercise** eminent domain; and, in his endeavor to sustain his contention, that the Federal Government possesses the right of condemnation, he calls to his aid the many constitutional and legislative provisions of the State of Idaho, authorizing, and permitting condemnation. He cites

the Eminent Domain Act, contained in Article one, Section 14; and, also, in Aritcle 11, Section 8; and Article 15, Section 1, of the Constitution of Idaho, to the effect that the right may be exercised on behalf of public uses, under the limitations there imposed; and, also, to the effect that the use of waters of that State is declared to be a public one. Section 5210 of the code of that State enumerates the several **uses** on whose behalf eminent domain may be exercised. The section numbered 5211 enumerates the **rights** which may be taken; and the section numbered 5212 the **character** of private property that may be so devoted. The other quoted sections refer to grants of right of way over public lands of the State; the exemption from taxation of water users' associations, (which we submit is unconstitutional); how the records are to be made up; limitations upon charge to be made for use of such record, when part of the books are printed; requiring annual reports of irrigation companies; providing for the repayment of money advanced by the United States, by taxing certain districts; the form of bonds, and the graduated rates of interest payable thereon; and that the sale of lands owned by the State lying under irrigation works, shall be classified into farm units the same as prescribed by the Federal Congress; and ending with some citations, tending to sustain the contention that the use of water in the arid West is a public one, which will support the exercise of the right of eminent domain. We cannot conceive that

any of these citations, or the urging of the contention, bears upon the question involved, in any wise.

The right to exercise eminent domain, on behalf of the United States, is not derived from the constitution, or any statute, of Idaho, nor could the State of Idaho, by constitution or statute, place any limitation upon the federal right to exercise. Such power as the United States has in this direction, is inherent in it as a sovereign; and, while the United States is not sovereign in all respects, so far as the right to exercise eminent domain is concerned, the United States is independent of any State provision,of whatsoever kind it may be. So it ill concerns us whether or not Idaho has been gracious in this particular, or what uses, or what estates, or what kind of property may be enumerated by its codes; the United States is not dependent upon the eminent domain concession of this, or any other state. These provisions were intended to confer rights upon the persons, artificial or natural, as distinguished from the government, who sought to indulge in the dedication in this case. And, if it had not been provided by the Constitution or Statutes of Idaho, so far as the Federal Government, acting within its powers, is concerned, its right to condemn property located within the geographical boundaries of the State of Idaho, could not be questioned.

Kohl vs. U. S., 91 U. S., 367.

Most certainly the irrigation of land in the

western country is a public use. This is one question; the right of the Federal Government to engage therein, however, is a different question. As Mr. Justice Miller said, in the case cited by Defendant in Error, entitled Loan Assc. vs. Topeka, 20 Wall., 655:

> "There is no such thing in the theory of our governments, state and national, as unlimited power in any of their branches. The Executive, the Legislative, and the Judicial Departments are all of limited and defined powers.
>
> "Among these is the limitation of the right of taxation, that it can only be used in the aid of a public object, and objects which are within the purposes for which governments are established.
>
> "It cannot, therefore, be exercised in the aid of enterprises strictly private, for the benefit of individuals, though in a remote or collateral way the local public may benefit thereby.
>
> "A statute, which authorizes a town to issue bonds in aid of a manufacturing enterprise of individuals, is void, because the taxes necessary to pay the bonds, if collected, would be a transfer of the property of individuals to aid in the projects of gain and profits of others, and not for a public use, in the proper sense of that term."

And hence we urge that the proceeds arising from the sale of public lands, which belong to all the people, may not be expended for the purpose of aiding private enterprise, and in favoring a comparatively few persons, any more than money arising from taxation, might so be expended. And we want to submit, that while our friends seek to carry the

court from the main question, by urging that the benefits to the private land owners was "incidental," merely, the facts, Findings, and Conclusions refute this; and, on the contrary, disclose the private benefits to be derived from this scheme, to be superior, and in magnitude many times, to that of the Federal Government. It does not here concern us whether the use of water in the West is a public use, or however generous the State of Idaho may have been by its constitutional and legislative provisions in this direction. Neither can confer power on the Federal Government to engage in an enterprise, wholly without the Federal constitution; one that is almost entirely devoted in furtherance of private irrigation, and the favoring, by the expenditure of enormous sums of money, a handful of the inhabitants of the State of Idaho.

The principle enunciated in United States vs. Gratiot, 14 Peters, 567, to the effect that if the Government of the United States could lease its lands, it could likewise lease the lead mines situate thereon, doesn't aid the contention of counsel for defendant in error. The lead was part of the land,and the property of the government. The question presented for review involves the application of the principle enunciated by Mr. Marshall in McCulloch vs. Maryland, 4 Wheat., 316, as a standard of measurement:

> "If the end be legitimate, **and within the scope of the constitution,** all means which are appropriate, which are plainly adapted to that

> end, and which are not prohibited, may constitutionally be employed to carry it into effect."

We are then to ascertain, first of all, whether or not "the end be legitimate, and **within the scope of the Federal constitution,**" since that instrument, and not the constitution of the State of Idaho, will determine whether or not the Defendant in Error is possessed of the power to devote the proceeds of public property for a furtherance of private enteprise. We must not only ascertain whether it is permissive by the Constitution, but likewise we must ascertain whether or not the acts sought to be indulged in, are in any wise prohibited by the same instrument. The carrying of the scheme into effect is highly secondary to the ascertainment of the possession of the power to do so.

It is a matter of common history that when the Federal Constitution was proposed, the State of New York, without whose concurrence it was not probable the instrument could be adopted, was disinclined to enter into the compact; her comparative geographical situation; her natural navigation facilities, and many similar things, made her independent. For the purpose of securing her vote favoring adoption, a series of communications, from the pens of Mr. Hamilton, Mr. Madison, and Mr. Jay, were published in the local papers. It is interesting to refer to the "Federalist" and note the very limited consideration that Section 3, of Article 4, of the Constitution, received

from these gentlemen. Mr. Madison, in speaking of it, said:

> "This is a power of very great importance, and required by considerations similar to those which show the propriety of the former. The pruviso annexed is proper in itself, and was probably rendered absolutely necessary by the jealousies and questions concerning the western territory, sufficiently known to the public." (Federalist No. 43.)

We can readily see that the provision, "To dispose of and make all needful rules" pertaining to the disposition of public property, had no such scheme as is now proposed under this constitutional authority, and that its increased purview is but similar to all efforts to secure public aid in furtherance of private enterprise.

Mr. Madison likewise said, in Federalist No. 45, that

> "The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."

Hence, it has been held that the United States is sovereign and supreme in its appropriate sphere of action, as defined by the Federal Constitution, yet does not possess all the attributes of sovereignty, nor all the powers which usually belong to a sovereign nation, but only the specific and enumerated ones found in the Constitution, and which were con-

ferred upon it by that instrument. Neither the Legislative, Executive, or Judicial departments of this Government can lawfully exercise any authority beyond the limits marked out by, or fairly inferable from, that document. Nothing illustrates this better than the fact that Federal courts are more narrow in jurisdiction, than the State courts; and it is undoubtedly beyond question that the United States is acknowledged by all to be a government enumerated powers, and that it can exercise only such as are specifically granted, or necessarily inferential therefrom.

Dred Scott case, 19 How., 393, 633;
In re Debs, 158 U. S. 564, 600;
McCulloch vs. Md., 4 Wheat. 316.

The commercial power of Congress is exclusive and paramount only when, (1st) The subjects are national in nature, character, and sphere of operation; as in interstate commerce, which demands a uniform rule of regulation for the entire country, such as will operate alike, and equal in each State of the union. As to such, the power of the Federal Congress is exclusive. (2d) Those subjects which are local in nature, character, and sphere of operation, such as the improvement of navigable waters, the establishment of dikes, jetties, buoys, beacon lights; the construction of bridges over navigable streams, regulation of pilotage, etc., which, by reason of their fixity, are local, yet the provisions adapted to their respective needs, are general. In this second class the States

may act until Congress elects to do so, when its authority supersedes that of the particular state. It is chiefly in the exercise of these powers that the Federal Governmnt has resorted to the exercise of eminent domain. In every instance, however, it has been for a public use, and not for private emolument. And, while the implied powers are just as much a part of the Constitution as those expressed, they can arise, not spontaneous, as mushrooms, but only from such language as is expressed. It is like all implied obligations, the law will not spring the implication, unless there is some showing by facts that, in good conscience, the obligation should be performed. Under the expressed constitutional provision that Congress shall have power to dispose of the property of the United States, and to make all needful rules and regulations in furtherance thereof, we submit implication will not justify the Government's entering the field of commerce, nor favoring a few of its citizens.

It was urged on the oral argument, that Congress had exercised the right of disposal, by giving large grants of land to railroad companies, and also had made specific allotments to settlers, under the various acts of Congress, such as the Homestead, Desert Land, and similar provisions. This is true. The several gifts to railway companies are not purely eleemosynary, however, but were designed to encourage the building of highways, making the Government's own property accessible; to provide for postal dissemination, and military transportation. The same

is equally true of the gifts of land to settlers. They were not purely charitable, but were sales, at bargain counter prices, made in anticipation of further advantages accruing to the Government. While railroad grants were usually specific in terms, the opportunity to be possessed was open to all who contemplated railroad construction, into, and through, the west, and it was confined almost entirely, if not wholly, to developments in this part of the United States. These semi-gifts, perhaps more truly denominated sales at wholesale prices, were general, not limited to a few; open to all, denied to practically none. Quite the contrary appears in the case at bar.

Constitutional powers have been classified:

1st. Those belonging exclusively to the states.

2nd. Those belonging exclusively to the national Government.

3rd. Thost which mav be exercised concurrently and independently.

4th. Those which may be exercised by the states, only when Congress has not exercised its right to act.

Among none of which is the power the national Government seeks to exercise under the Reclamation Act, in the irrigation of private property.

Attention is invited to the lack of any substantive statement in the Reclamation Act, that it was designed to furnish water for the irrigation of private property. There are two statements pertaining to this class of service, but they are wholly inferential; and

are so placed, and so worded, as to escape casual attention, which, of itself, creates some suspicion as to their not having been made very prominent, at the time the Act was being debated, and considered for passage.

We find in section 1, a statement of the substantive purposes of the Act, and in that section, among the objects there contained, the irrigation of private property is conspicuous by the absence of its presence. Near the center of the section numberd 4, we find the following language: "also of the charges which will be made per acre upon said entries, and upon lands in private ownership, which may be irrigated by said water * * * *" We also find in the section numbered 5, the following: "No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres, to any one land owner."

In the first quoted language, no right is given to enter upon private service. The expression relates merely to the "charges" which will be made per acre. In the latter quotation we observe an equal absence of anything substantive; the question there being treated is a limitation upon the **quantity** of water for land in private ownership, which will be sold. Whoever framed the bill adroitly made such treatment of this matter, assuming that mercantile powers would be derived from inference, and we submit, in the light of the circumstances attending the passage of the bill, that if it had been proposed, out and out, direct-

ly and expressly, that the Government was entering the field of public service, to become competive, in a mercantile way, such features would have been eliminated from the Act, or the Act defeated in toto.

From page 6669 to 6779, of the Congressional Record, for June 12th and 13th, 1902, will be found the history of Congress' consideration of this measure. There will be found a quotation from the Republican platform of 1900, to show that that political party had regarded the reclamation of arid public lands in the west, of prime importance; and that the Democratic party, by platform expression, had concurred in this estimate. The Republican platform, upon the question, reads as follows:

> "In further pursuance of the constant policy of the Republican party to provide free homes on the public domain, we recommend," etc.

And the Democratic platform upon the same question, as follows:

> "We favor an intelligent system of improving arid lands of the west, by storing waters for the purposes of irrigation, and the holding of such lands for actual settlers."

Amplifying, and specifying with greater particularity, Mr. Roosevelt, in his message of that year, said:

> "The reclamation of the unsettled, arid,

> public lands, puts a different question (from navigation) * * * *. The object of the Government is to dispose of the land to settlers who will build homes upon it. To accomplish this object, water must be brought within reach."

By analyzing the Republican platform expression, it will be noted that it is claimed that it had been the constant policy of that party to provide free homes on the **public domain.** This implies the improvement of the public property of the United States, and not the private property of some of its citizens. The Democratic expression is to the effect that it favored an intelligent, not an obscure, system of improving arid lands, "by storing waters for that purpose, and holding of such lands for actual settlers," which equally implies the improvement of the public land of the United States, and not the private lands of a few of its citizens. The thought of the President was the reclamation of the **"unsettled, arid, public lands,"** and not the already-settled, improved private lands. That "the object of the Government" was to dispose of her public domain to such "settlers as would build homes thereon," and that, in order to encourage the accomplishment of such a result, it was necessary to bring water within the reasonable reach of the settler; not that it was necessary to place water within the reach of any other than the settler class.

The Federal, of all tribunals, should be the last

to sanction the exercise of powers not constitutionally possessed; and, while the inquiry should be full and free, and interference be preceded and attended by caution, we should remember that one of the primary objects in creating this branch of our Government, was that it should serve this specific purpose. The Judicial department was not established, wholly for the arbitration of private differences, but was equally established for the purpose of determining when, and in what cases, the Executive and the Legislative usurp powers not possessed by them. The Judicial has well served the people in these particulars, and numerous have been the occasions for interference, and the exercise of this function; since the other branches of the Government have, in many instances, not hesitated at their constitutional boundaries.

There is a noticeable tendency towards centralization, and usurpation of power by the Executive department of the Federal government; having as its foundation the theory, that, even if the powers be not expressly, nor inferentially, conferred, they may, in the absence of state election so to do, be exercised by the central government, in all cases short of actually expressed constitutional inhibition.

Ambitious men have arrogated before; history does not inform, nor does experience demonstrate, such to have redounded, in consequence, or result, to the perpetuity of republican institutions; the assurance of governmental welfare; nor to the security, the preservation, or the continuity of personal liberty; and at this particular time, numerous and

vehement objections are being urged by members of Congress, and others, against the insistence of the government, particularly in the western country.

This, of all, governments can ill afford to countenance such tendency, and, with as little safety, can it concur in, adopt, sanction, or encourage the theory of, or indulgence in, such visionary dreams. Respect for our institutions have preserved them, and safeguarded our people; the men of their creation, those who have been the recipients of their beneficence, fostered thereby, are, however, equal in their ambitions, and are as ardent lovers of power, as those of other days, who, in other lands, have played on executive stages.

It was of the light shed by, and reflected from, observations in noting the experience of others, that our prudently cautious, and far into the future seeing, forefathers, framed our constitution, and established judicial departments to inquire into, inspect, limit, and prevent just such ambitious tendencies, personal desires, and conduct.

This the opportunity, and equally the occasion, for the exercise of such judicial function. We submit that the dedication of the lands of plaintiff in error, to the irrigation of private lands, is unjustifiable: that the engagement of the federal government in enterprises, having such object in view, is not only wholly unwarrantd, but is prohibited; that it contemplates mercantile engagements, and not an exercies of constitutional governmental functions. That is is fraught with dangerous precedents; is

usurpatious; and is not one of the purposes for which republican governments are formed.

Respectfully,

JNO. G. WILLIS,

Counsel for Plaintiff in Error.